Supreme Court, U. S.
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No. 80-811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOHN LONG, JANICE LONG
and JACKSON COUNTY
EMERGENCY MEDICAL SERVICE, INC., d/b/a
PAS-POINT AMBULANCE SERVICE,
Plaintiffs-Petitioners,

versus

LARRY ARCELL, TIMOTHY F. KRIEHN,
ROBERT ELLZEY, and THE SOUTH
MISSISSIPPI SUN and THE BILOXI
HERALD, d/b/a THE SATURDAY
SUN HERALD, and GULF
PUBLISHING CO., INC.,
Defendants-Respondents.

Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

OF COUNSEL
JOHN C. ELLIS
Mize, Thompson & Blass
Suite 310
Gulf National Bank Bldg.
Gulfport, MS 39501
Telephone: 601/863-2612

W. JOEL BLASS
Attorney of Record
Mize, Thompson & Blass
Suite 310
Gulf National Bank Bldg.
Gulfport, MS 39501
Telephone: 601/863-2612

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 - 504/822-1611

QUESTION PRESENTED

We consider both questions presented by the Petitioners to be false and misleading. Correctly redrafted, the sole question should be:

Whether the United States Court of Appeals for the Fifth Circuit correctly held the Petitioners to proof of liability by clear and convincing evidence in accordance with the *New York Times* actual malice rule?

TABLE OF CONTENTS

Page

QUESTION PESENTED i

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 3

ARGUMENT 3

Whether the United States Court of Appeals for the Fifth Circuit correctly held the Petitioners to proof of liability by clear and convincing evidence in accordance with the *New York Times* actual malice rule 4

CONCLUSION 24

CERTIFICATE 26

TABLE OF AUTHORITIES

Cases:

Associated Press v. Cook, 513 F.2d 1300 (10th Cir. 1975) 11

Associated Press v. Walker, 388 U.S. 130 (1967) 25

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967) 25

PREVIOUS PAGE WAS BLANK

TABLE OF AUTHORITIES (Continued)

Page

Edwards v. National Aubudon Society, Inc., 556 F.2d 113 (7th Cir. 1977) 19

Evans v. Triple R. Welding and Oil Field Maintenance Corp., 472 F.2d 713 (5th Cir., 1973) 12

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 25

Hotcher v. Castillo-Puchae, 551 F.2d 910 (2d Cir. 1977) 22

Hutchinson v. Proxmire, 443 U.S. 111 (1979) 10,11

Hutchinson v. Proxmire, 579 F.2d 1027 (7th Cir. 1978) 10

Kidder v. Anderson, 354 So.2d 1306 (La. 1978) 20

Logan Lumber Co. v. Commissioner of Internal Revenue, 365 F.2d 846 (5th Cir. 1966) 10

Long et al. v. Arcell et al., 618 F.2d 1145 (5th Cir. 1980) 2,22,23

Marietta Corp. v. Evening Star Newspaper, 417 F.Supp. 947 (DDC 1976) 19

Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977) 20

Miller v. Avirom, 384 F.2d 319 (D.C. Cir. 1967) 9-11,13

New York Times v. Sullivan, 376 U.S. 254 (1964) .*Passim*

Pierce v. Capital Cities Communication, Inc., 576 F.2d 495 (3d Cir. 1978) 21

Singleton v. Wulff, 428 U.S. 106 (1976) 12

TABLE OF AUTHORITIES (Continued)

Page

Trans-World Accounts, Inc. v. Associated Press, 425 F.Supp. 814 (N.D. Cal. 1977) 19

Walker v. Continental Life and Accident Co., 445 F.2d 1072 (9th Cir. 1971) 11-12

Wolston v. Readers Digest Ass'n, Inc., 443 U.S. 157 (1979) 10

Wolston v. Readers Digest Ass'n, Inc., 578 F.2d 427 (D.C. Cir. 1978) 10

Other Authorities:

Const. of the U.S., Amendment I 2

28 U.S.C. 1254(1) 2

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *John Long, Janice Long, et al, v. Larry Arcell and Timothy F. Kriehn, individuals, et al,* 618 F.2d 1145 (5th Cir., 1980). Rehearing was denied on August 20, 1980. A copy of the Opinion is before this Court as Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

The Petitioners seek to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C. 1254(1). Petitioners have posed two questions for review, neither of which, in our opinion, would justify a review on certiorari. (Rule 17.1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners seek to invoke the provisions of the First Amendment to the Constitution of the United States of America.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press. . .

STATEMENT OF THE CASE

The review of the facts presented in the Opinion of the United States Court of Appeals for the Fifth Circuit (Appendix "A" to the Petition) are adopted by the Respondents in the interest of brevity. Also for the sake of brevity, any portion of the Petitioners' statement of the case which is subject to more than one interpretation is fully developed in the body of the Respondents' argument.

REASONS FOR DENYING THE WRIT

No questions of substance are presented by Petitioners' assertions of denial of their rights. They have shown no special or important reason for granting the writ, and the United States Court of Appeals for the Fifth Circuit has not rendered a decision in conflict with the decision of another federal court of appeals on the same matter; has not decided a question already settled by this Court; and has not departed from accepted and usual courses of judicial proceedings, to call for supervision by this Court.

ARGUMENT

Introduction

The Petitioners contend that the Fifth Circuit Court of Appeals applied a standard for the determination of

the existence of actual malice in a *New York Times*[1] defamation action which conflicts with the decisions of this Court. Petitioners have, in effect, requested an advisory opinion from this Court, for they now attempt to state that they are "private figures" and that the standard of *New York Times* does not apply to them. At the same time they request this Court to rule that the Fifth Circuit applied an erroneous standard of *New York Times* review, which they contend does not apply to them. If the Petitioners are not "public figures," the standard of review imposed by the Fifth Circuit was inapplicable. If they are "public figures" the second issue posed for review need not be reached.

In any event, there is only one issue properly before this Court: Whether the United States Court of Appeals for the Fifth Circuit correctly held the Petitioners to proof of liability by clear and convincing evidence in accordance with the *New York Times* actual malice rule. Consideration of this issue presupposes an inquiry into whether the Appellate Court correctly applied the *New York Times* rule in its independent examination of the evidence.

The Question:
Whether The United States Court Of Appeals For The Fifth Circuit Correctly Held The Petitioners To Proof Of Liability By Clear

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1 *New York Times v. Sullivan*, 376 U.S. 254 (1964).

And Convincing Evidence In Accordance With The *New York Times* Actual Malice Rule.

The Fifth Circuit assumed that the Petitioners were public figures when the article was written for the clear reason that Plaintiffs, through their attorney, so stipulated at trial. Petitioners advanced the argument that they should be relieved of this stipulation. Petitioners do not, however, set forth the correct sequence, nor indeed the setting, in which this "stipulation" was made. (Petition for Writ of Certiorari @ 22).

Plaintiff's original Complaint alleged that Defendants Arcell and Kriehn acted with actual malice. In the Answers filed by the various Defendants, the Defendants raised affirmatively the issue of whether the Plaintiffs were public figures. The affirmative defenses, for the sake of brevity set forth that the Plaintiffs were limited-purpose public figures. The Defendants also raised in the Joint Pre-Trial Order as a contested issue of law whether the Longs were public or private figures. The Plaintiffs did not list as a contested issue of law whether the Longs were public or private figures.

As further background for Counsel's concession that the Plaintiffs were public figures, it should be noted that Plaintiffs' case in chief was tried on the theory that Petitioners were public figures. Although the voir dire and opening statements are not of record, during the

argument on Defendants' Motion for Directed Verdict made at the close of Plaintiffs' case in chief, is found the following:

> Your Honor, also as to the third grounds for the motion, is the degree of proof involved here. Mr. Wilson announced prior to voir dire and in his opening statement that he was going to prove that the Longs were public figures and still prove libel. As Your Honor knows, in that case, he can only recover upon clear and convincing proof that the defamatory falsehood was published with knowledge of its falsity or with reckless disregard for its truth. That's also the same standard on Plaintiffs' punitive damages. Your Honor, that clear and convincing standard of proof has not been met. (R. 566).

These assertions are unrebutted in the record.

In the ruling on the motion, is found the following:

* * *

BY THE COURT:

> Neither side argued the question or alluded to the question of whether the plaintiffs are public or private figures, which I think is a very important and crucial question in this case. If

there is a question as to whether they were private or public figures.

It is my understanding — correct me if I am wrong, Mr. Wilson, that plaintiffs concede they were 'public figures,' within the meaning of the law . . . and I ask you if you contend they were private as opposed to public figures, or whether you concede for the purposes of the record that they were public figures, within the meaning of the law?

BY MR. WILSON:

Judge, I think if they are not public figures they come as close as you can to being public figures without being public figures. There are some cases I have found of the district courts, in the Federal Supplement, not to put it off on the district courts, of course, where it tends to indicate this. I would think in this case that it is a question. I would think it questionable but I don't think it is highly questionable in this case whether or not they were public figures. That's the reason I was reading out of St. Amant, which is a public figure case about recklessness and doubting the accuracy.

BY THE COURT:

All right, do you concede then, for the purposes of the record that they were 'public figures' as opposed to 'private figures or individuals?'

BY MR. WILSON:

> Yes, Sir, I will concede that for the purposes of the record. (R-578-579).

Although the trial court did rule that its holding would have been that the Plaintiffs were public figures, this holding is thus placed in perspective. The Plaintiffs' theory on which this case was tried, was that they were public figures. This conclusively appears from the Pre-Trial Order, the voir dire, the opening statement, the argument on Defendants' Motion for Directed Verdict made at the close of Plaintiffs' case in chief, and the lack of applicable objection to the jury instructions.

Plaintiffs' theory and concession, occurring prior to the Defendants' case, thus prevented the Defendants from presenting proof on their affirmative defenses that Plaintiffs were public figures.

The issue attempted to be raised by Petitioners is thus false and misleading. It is not whether Plaintiffs may be relieved of their stipulation that they were public figures, but rather, whether it is a miscarriage of justice to allow a defeated litigant to abandon the theory of the case upon which the action was tried, and attempt to cause the district court to be placed in error on an issue neither raised nor appropriately submitted for a determination in the court of first resort.

The general answer to the restated question is found in *Miller v. Avirom,* 384 F.2d 319 (D.C. Cir., 1967):

> . . . By our current appraisal, the question appellant poses is sufficiently substantial to command serious attention if properly presented for our decision. But because the issue was neither raised nor decided in the District Court, we do not address it on this appeal or intimate any view as to how it should be resolved.
>
> In our jurisprudential system, trial and appellate processes are synchronized in contemplation that review will normally be confined to matters appropriately submitted for determination in the court of first resort. Questions not properly raised and preserved during the proceedings under examination, and points not asserted with sufficient precision to indicate distinctly the party's thesis, will normally be spurned on appeal. Canons of this tenor reflect, not obeisance to ritual, but "considerations of fairness to the court and the parties and of the public interest in bringing litigation to an end after fair opportunity has been afforded to present all issues of law and fact. The injunction that trial ventilation precede appellate exploration best subserves that policy without appreciable imposition upon the litigants. It requires them to deal

> fairly and frankly with each other and with the trial tribunal with respect of their controversies. It prevents the trial of cases piecemeal or in installments. It tends to put an end to litigation . . . 384 F.2d 321-322 (footnotes omitted).

The instant Petition presents Petitioners' third theory upon which liability is sought to be imposed. In the trial court, Petitioners' theory was that they were public figures. On appeal they contended that they relied on the Court of Appeals decision in *Hutchinson*[2] and *Wolston*,[3] both of which were reversed by the Supreme Court.[4] This of course was an impossibility, as the Courts of Appeals' decisions in both cases, occurred after the trial of this cause.[5] Petitioners did request that they be relieved of their stipulation of being public figures because of "a mistake of law induced by the then existing state of the case law." *Logan Lumber Co. v. Commissioner of Internal Revenue*, 365 F.2d 846, 855 (5th Cir. 1966). Finding no success in their second theory, Petitioners now abandon their theory that they were induced by the existing state of the law by arguing that

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2 *Hutchinson v. Proxmire*, 579 F.2d 1027 (7th Cir. 1978).

3 *Wolston v. Readers Digest Ass'n, Inc.*, 578 F.2d 427 (D.C. Cir., 1978).

4 *Wolston v. Readers Digest Ass'n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979).

5 The instant trial took place from February 28, 1978 through March 3, 1978. *Wolston* was decided by the Seventh Circuit on May 23, 1978, and *Hutchinson* was decided by the District of Columbia Circuit on June 30, 1978.

the stipulation was one of law, and that *Hutchinson* rendered them private individuals.

These changing theories are advanced absent a reason for a reviewing Court to consider an issue raised by the first time on appeal. Courts of Appeals lack original jurisdiction and are unequipped to handle trial functions. Thus, appellate review is, of necessity, conducted on the record made in the trial court. *Miller v. Avirom*, 384 F.2d 319, 321 n.8 (DC Cir., 1967).

> . . . Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the Court below. Almost every case would be in effect tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved. *Id.*, n.11 @ 322 (citations omitted).

As previously set forth, this issue was not properly raised before the trial court in the Pre-Trial Order, or in Plaintiffs' case in chief. It is, thus, inappropriate for appellate review. *Associated Press v. Cook*, 513 F.2d 1300 (10th Cir., 1975). The orderly disposition of cases requires that parties relying on a factual position make that position known to the trial court so that evidence may be proffered and rulings made thereon. As a general rule, a reviewing court will not reverse a trial court on a position never properly presented to it. *Walker v. Continental Life and Accident Company*, 445 F.2d 1072 (9th

Cir., 1971). There are, certain exceptions to this rule, as where a pure question of law is involved and a refusal to consider the issue raised for the first time on appeal would result in a miscarriage of justice. *Evans v. Triple R. Welding and Oil Field Maintenance Corp.*, 472 F.2d 713 (5th Cir., 1973).

This general rule has been repeatedly recognized by this Court, which explained that its essential purpose was that a party might have the opportunity to present all the evidence it believes relevant to the issues, and in order that a litigant might not be surprised on appeal by a final decision of issues upon which it has had no opportunity to introduce evidence. This Court further held that the decision of what issues might be taken up and resolved for the first time on appeal is left primarily to the discretion of the court of appeals. *Singleton v. Wulff*, 428 U.S. 106 (1976).

The decision of the Fifth Circuit is in accord with the various circuits, and indeed, with the applicable decisions of this Court. Petitioners have shown nothing to distinguish this case from the general rule that a trial court may not be placed in error on an issue not properly submitted to it for determination, nor have they shown an abuse of discretion by the Fifth Circuit. Clearly, Petitioners had the opportunity to preserve this issue for appeal. Having specifically waived the issue, by proceeding on their chosen theory that they were public figures, it would be a clear miscarriage of

justice-to allow Petitioners another day in court because they now contend, that if a different standard of liability were imposed, they might prevail. *See: Miller v. Avirom, supra.*

The manifest injustice to the Respondents, and indeed the entire judicial system, is readily apparent if such dispensation were permitted.

Petitioners also claim the Fifth Circuit has applied an erroneous standard for the determination of actual malice. This contention is evidently based on Petitioners' failure to grasp the issues. Such failure is illustrated by the following language:

> . . . Whether a standard for the determination of actual malice, which prevents a public figure defamation plaintiff from recovering where there is evidence of knowing and reckless falsity, conflicts with the decisions of this Court. (Petition for a Writ of Certiorari at 1.)

Petitioners' language should conclusively and by itself, establish that the Writ should be denied. The question of whether the evidence offered by a public figure defamation plaintiff on the issue of "actual malice" satisfies the "convincing clarity" standard is not merely to see whether there is *any* evidence on the issue, as Petitioners seem to suppose. The question is whether the evidence presented possesses the "convincing clarity" demanded by the Constitution, and this

is a question of law for the Court after its own personal "do novo review" of the facts.

In a misleading effort to demonstrate that the evidence ". . . clearly and convincingly supports the finding on *New York Times* actual malice . . ."[6] the Petitioners purported recitation of the alleged evidence takes evidence out of sequence and context and is characterized by omissions and misrepresentations. Space does not permit the Respondents to set forth all of the deficiencies in Petitioners' alleged recitation of the evidence. The opinion of the Fifth Circuit correctly sets forth the sequence of events.

Briefly expounding upon the evidence, set forth therein, it should be noted that Arcell, the original author of the article at issue, contacted Petitioners to obtain their response to the statements of Bradshaw and Shumaker, representatives of the Emergency Services Division of the State Board of Health. Arcell was referred to their attorney, Mr. W. Roberts Wilson. Arcell contacted Mr. Wilson on May 7, 1976. (R 382). On the same date, Mr. Wilson again telephoned Arcell and asked for another reporter, Robert Ellzey. (R 385-86). Thereafter, Mr. Wilson did not talk to Arcell. Apparently, Mr. Wilson asked that Ellzey be assigned to the story because of their previous relationship. (R 455). Ellzey had been in Wilson's office on several occasions, and Wilson was in fact one of Ellzey's sources

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6 Petition @ 6.

of information concerning the Jackson County Board of Supervisors. (R 430-31). Wilson felt that Ellzey would listen to what he said and that he would be fair. (R 455). Ellzey talked to Wilson on several occasions, and also talked to Janice Long.

Although Arcell first communicated with Bradshaw on May 6, 1976, the license was not mailed to the Petitioners until May 10, 1976, four days after Arcell talked to Bradshaw. Arcell talked to Mr. Wilson on May 6, 1976, in which Mr. Wilson allegedly disputed the facts surrounding the issuance of the license. Wilson's dispute occurred while he was in Idaho, without his clients' file. (R 387). At this time, the license had not been issued, and was not in fact received by Mr. Wilson until May 11, 1976, five days after the initial conference with the Defendant Arcell. Defendant Ellzey talked with Mrs. Long on May 12, 1976. Although she allegedly informed Ellzey that they were licensed, she never received the license and never had it in her possession. (R 114). Incredibly, Mrs. Long applied for the license in dispute on May 13, 1976, which was the day after she allegedly informed Ellzey that they were licensed. (R 96, 216).

Turning now, to the misrepresentations and omissions contained in the Petition, a few glaring examples should conclusively demonstrate the false and misleading tactics of Petitioners.

> . . . Both state officials [Shumaker and Bradshaw] testified that they advised the reporters that the Plaintiffs were licensed on February 18. (R 208, 254) . . . (Petition @ 3)

The cited record does not establish what Petitioners claim. In fact, Mr. Shumaker testified that the article in question was correct. (R 226-27)

Mr. Bradshaw testified:

> Q. Did you tell Mr. Arcell that the license was issued February 18th, 1976?
>
> A. *Yes* (R-272) (emphasis added). Mr. Bradshaw further testified:
>
> Q. Is there any possibility that you would have told him, "Our records reflect that Pas-Point Ambulance Service operated for six weeks without a license"?
>
> A. No.
>
> Q. Is there any possibility that you would have told him any other license date other than February the 18th, 1976?
>
> A. No, I would not.
>
> Q. Is there any possibility you told him that you gave him a temporary license?
>
> A. No. (R. 274-75) (Petition @ 7-8).

While the quotes are accurate, the following cross

examination of Mr. Bradshaw clearly sets forth the lack of basis for his testimony.

Q. When was the license for Pas-Point Ambulance Service issued?

A. On February 18, 1976.

Q. You have the file in front of you?

A. Yes.

Q. Would you show me in there where—

A. —Well, let me say this. I do not have — I have a document in the file showing the date that Mike Shumaker gave the authority for the license on February the 18th.

Q. Do you have a memorandum from Mr. Shumaker in your file?

A. A memorandum?

Q. Yes, saying that he gave them a license on February 18th?

A. No, I do not.

BY THE COURT:

When was that document you are referring to prepared and by whom?

BY THE WITNESS:

O.K., the copy of the license, the document is prepared, our procedures in our office is that once the field men come in from the field, after

inspections, they turn the information that they have over to the secretaries who process these licenses and I can not honestly say when this document was issued. (R. 276-277).

* * *

Q. Did you make any contemporaneous memoranda of your conversation with Mr. Arcell?

A. No, I did not. (R. 302).

* * *

Q. Do you know how long the Pas-Point Ambulance Service operated before they had a license?

A. Only hearsay. We do not know definitely, No.

Q. O.K. Do you know when the written license was issued?

A. The written license, the written documents?

Q. Yes.

A. No, I do not. (R. 284).

The apparent crux of Petitioners' contention that the Fifth Circuit applied an erroneous actual malice standard is as follows:

1. The alleged facts had been denied by the Plaintiffs' counsel. (Petition @ 11).

2. The alleged facts had been expressly repudiated prior to publication by the Defendant's sources, i.e., the state officials. (Petition @ 11, 13 and 15).

Petitioners' first argument appears to be that since the facts concerning the license were in dispute, the Defendant reporters should have rechecked their facts prior to publication. Apparently, since Plaintiffs' attorney disputed the facts of the article this somehow gave greater credence to the denial. However, liability under the "clear and convincing proof" standard of the *New York Times* Rule cannot be based upon mere denials, however vehement. *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (7th Cir. 1977). As the District Court for the Northern District of California recently stated, "if potential Plaintiffs in libel suits could cut off a malice defense simply by calling a newspaper and giving a broad denial of an article, the First Amendment policy embodied in *New York Times* would be undermined." *Trans-World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814 (N.D. Cal. 1977). Citing *Marietta Corp. v. Evening Star Newspaper*, 417 F.Supp. 947 (DDC 1976).The facts of *Trans-World Accounts, Inc. v. Associated Press, supra.*, are especially appropriate to the case at bar. In that case, a denial by an officer of the Plaintiff and a written demand for correction by Trans-World attorneys were deemed insufficient to supply the requisite proof of knowledge of falsity or awareness of probable falsity.

The lack of basis for Mr. Wilson's denials have been previously set forth, i.e., the fact that Wilson's dispute

occurred while he was in Idaho without his clients' file, the fact that the license was not received until four days after he disputed the information with Arcell, and the fact that the license was not shown to the Defendants until after the publication of the article.

Mr. Shumaker, one of the sources, testified that the article was correct. (R. 226-27). While Mr. Bradshaw testified at trial that he informed Mr. Arcell that the license was issued on February 18, 1976, the credibility of the publisher's information must be judged

> . . . not on the basis of an evaluation of sworn testimony at a trial (after full opportunity to rebut accusations), but rather on the basis of information available to the reporter at the time of publication. *Kidder v. Anderson*, 354 So.2d 1306 (La. 1978).

The record, as a whole, thus establishes that there was no knowledge of falsity, if indeed there is a falsity, no serious doubt concerning the truth of any of the passages in the article, and certainly no reckless disregard of whether the passages in the article were false. *Meeropol v. Nizer*, 560 F.2d 1061 (2d Cir. 1977). The reporters and editor entertained no serious doubts as to the truth of the publication, and, even after an evaluation of sworn testimony, it is impossible to establish the falsity of the article. They could not try the case before publication. *New York Times* also protects against self-censorship in that publishers, if exposed broadly to lia-

bility to defamation, might well engage in self-censorship. *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495 (3d Cir. 1978).

> . . . such self-checking could be expected to follow as much from the threat of a sanction as from the actual enforcement of one, for not only is it frequently difficult to prove the truth of a defamatory communication, but also the risk incurred in attempting to establish truth before fallible juries or judges is considerable. *Id.* @ 506-507 (footnotes omitted).

Plaintiffs have confused negligence, failure to investigate, and other alleged failures with the knowledge of falsehood or awareness of probable falsehood. They have not sustained their burden. What conceivable clear and convincing evidence does this record contain of awareness by the reporters and editor of probable falsity?

The review imposed by the Fifth Circuit was actually beneficial to the Petitioners. The Fifth Circuit assumed for the purposes of appeal that the article was false, even though Petitioners acknowledge ". . . A document evidencing the plaintiffs' right to operate was issued on March 31. . . ." (Petition @ 3).

Although the Fifth Circuit assumed the article was false, the testimony of Michael Shumaker and Doyle Bradshaw clearly established that the date as to when

Pas-Point Ambulance Service was licensed, is incapable of independent verification, for the records of the Emergency Medical Services Division of the State Board of Health contain no such information. (R. 277, 284, 221-222, 223). Since the date of license was incapable of verification and there was no convincing indicia of unreliability, publication of the article cannot constitute reckless disregard for the truth. *Hotcher v. Castillio-Puchae*, 551 F.2d 910 (2d Cir. 1977) cert. denied, 434 U.S. 834, 98 S.Ct. 120 (1977).

Of course, the barrier imposed by the *New York Times* Rule does not go to the truth or falsity of the published statement, but rather to the basic issue of whether the article was published with actual malice. The Fifth Circuit correctly held that the ultimate issue is not the falsehood of defamatory statements, it is whether a reporter and an editor publish with actual malice, i.e., with reckless disregard of whether such statements were false or not.

The opinion of the Fifth Circuit concludes its review of the evidence in the light most favorable to Petitioners:

> The Plaintiffs' case rested almost entirely on the testimony of Bradshaw and Wilson. Theirs was the only testimony relating directly to the defendant's state of mind. There was no documentary evidence which showed that the defendants knew their article was false or

> entertained serious doubts about its accuracy. In sum, the jury was left to decide the case based on the conflicting accounts of the conversations described above. If the applicable burden of proof had been a preponderance of the evidence a jury verdict either way would have to stand. Similarly, if liability could be imposed on a clear and convincing showing of negligence, we would be hard pressed to disregard the jury's verdict. We repeat, however, that the plaintiff's burden was to prove actual malice by clear and convincing evidence. This record simply does not contain clear and convincing evidence that the defendants knew that their information was incorrect or had a 'high degree of awareness of . . . its probable falsity.' *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964), 618 F.2d 1148 (footnotes omitted).

Petitioners do not dispute the conclusion that, although the evidence was conflicting, there was no documentary evidence which showed the Defendants acted with actual malice. In fact, with one exception not germain to the issue of actual malice,[7] Petitioners do

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7 Petitioners state ". . . that the Fifth Circuit's statement that Shumaker's conversation 'occurred after the article was published,' 618 F.2d @ 1148, is not supported by the record. While the record is not as clear as it could be as to the sequence of events, it does clearly show that the conversation between Arcell and Shumaker occurred prior to the May 15th publication date. . ." (Petition @ 8).

Petitioners' distinction actually undermines their position, as Shumaker testified at trial that the article was correct. *Supra* @ 13.

not challenge the Fifth Circuit's review of the evidence. It is not appellate review that is at issue; the issue is whether Plaintiffs proved, by clear and convincing evidence that the Defendants published false and libelous charges against the Plaintiffs which were known to be false, or about which the Defendants had serious doubts as to truth, with intent to harm through falsehood.

The record simply does not contain such proof. We apologize to the Court for the length of this Brief, but we felt mandated to correct Petitioners' false and misleading tactics. The Fifth Circuit affirmed the judgment notwithstanding the verdict because clear and convincing proof of liability is not in the record. Petitioners' attempt to demonstrate liability has failed, as the requisite proof is not there.

CONCLUSION

The jury in the trial below returned a verdict against all of the Defendants and assessed the Plaintiffs' actual damages at Fifty Thousand Dollars ($50,000.00), and punitive damages at Eighty-Five Thousand Dollars ($85,000.00). Thereafter, Judgment notwithstanding the verdict was entered for all of the Defendants.

The very size of the jury verdict is a classic example of the necessity for the *New York Times Rules-New York Times v. Sullivan*, 376 U.S. 254 (1964) and succeeding

cases including *Curtis Publishing Company v. Butts,* and *Associated Press v. Walker,* 388 U.S. 130 (1967) and *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974). The One Hundred Thirty-Five Thousand Dollar verdict illustrates drastically what happens when the jury is allowed to speculate on damages for alleged libel involving public figures.

The rights of the public intervene in every libel action brought by a public figure. This is an indisputable truth of constitutional law. The jury, favoring the individual litigants, cannot be permitted to override the greater public or national interests. It is within the peculiar province of the Court to safeguard these higher rights.

Clear and convincing evidence of actual malice is simply not present here. Justice demands that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

MIZE, THOMPSON & BLASS

W. JOEL BLASS
Attorney of Record
310 Gulf National Bank Bldg.
P.O. Box 160
Gulfport, MS 39501
Telephone: 601/863-2612

and

JOHN C. ELLIS
310 Gulf National Bank Bldg.
P.O. Box 160
Gulfport, MS 39501

Of Counsel

Attorneys for Defendants-
Respondents
MIZE, THOMPSON & BLASS

CERTIFICATE

I, W. JOEL BLASS, of the firm of Mize, Thompson & Blass, attorneys of record for the Defendants, do hereby certify that I have this day mailed, postage prepaid, three true and correct copies of the above and foregoing Brief In Opposition to Honorable W. Roberts Wilson, Attorney for Petitioners, at his usual and customary post office address, P.O. Box 1507, Pascagoula, Mississippi 39567; and three true and correct copies of the above and foregoing Brief In Opposition to Honorable Gary L. Roberts, attorney for Petitioners, at his usual and customary post office address, P.O. Box 237, Pascagoula, Mississippi 39567.

I further certify that all parties required to be served have been served.

This, the ____ day of December, 1980.

W. JOEL BLASS